
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

STATE OF ILLINOIS,

Petitioner,

VS.

JOHN J. TROLIA,

Respondent.

ON PETITION FOR A WRIT
OF CERTIORARI TO
THE APPELLATE COURT OF ILLINOIS,
FIRST JUDICIAL DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION

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Respondent John Trolia, by his counsel, urges
that the petition for a writ of certiorari be denied.
The decision below was decided upon a question of
state law. No federal question was involved. The
decision is correct.

OPINION BELOW

The opinion below is reported in 69 Ill. App. 3d
439, 388 N.E. 2d 35 (1979).

QUESTIONS PRESENTED

1. Whether this Court should grant certiorari
where state reviewing courts grant the accused a new
trial because of the prosecution's violation of state
rules of discovery.

2. Whether the prosecution's failure to disclose
a witness who had known and had worked with the deceased
for seven months, and had seen the deceased alive and
well almost three days after the defendant allegedly
had murdered the deceased, constitutes a corruption of
the truth-seeking function of the trial process under
any standard of materiality.

THE PETITIONER'S STATEMENT OF THE
CASE IS INACCURATE AND MISLEADING.

*The cruelest lies are often told
in silence. Barbee v. Warden, 331
F. 2d 842, at 846 (1964)*

The petitioner has recited facts without any record reference whatsoever. This places an unreasonable burden upon this Court and the respondent in determining whether the statement of the case is accurate and complete.

It is not.

Petitioner has misstated some facts. Other crucial facts are left out.

The following inaccuracies should be sufficient for this Court to deny the petition for a writ of certiorari under Rule 23—4:

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3 The body was not floating. It was stuck in the mud, with the back of the head and the shoulders exposed. The water was very shallow. "It was stationary. Seemed to be stuck in the mud." (R. 196)*

3-4 The coroner's pathologist did not testify to post-mortem changes in the body of the deceased. The prosecutor asked general questions as to post-mortem changes in bodies immersed in water. The coroner's pathologist qualified his answers with the phrase, "Under normal conditions." (R. 272—273)

Also incomplete— When the coroner's pathologist was conducting the autopsy, he stated to evidence technician Pearson that the body had been in the water approximately a day and a half. (R. 484-485)

* "R" refers to the Report of Proceedings at the Trial.

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4 Incomplete— On September 8, 1974, prosecution witness Richard "Animal" Maskas was arrested in the City of Chicago. He had in his possession a fully-loaded .22 caliber 4-shot Derringer pistol, the alleged murder weapon. At that time Maskas was a prime suspect. It was then that he implicated the respondent Trolia.

Maskas: A. I believe[d] that he killed someone after I was arrested for it, you know. That is when it came to my mind.

Q. And then you decided to report it to the police?

A. Right. (R. 100)

4 Imprecise and misleading— The date of the alleged admissions is not just "later in the week." The precise date testified to was Tuesday, September 3, 1974, at 5:00 P.M. (R. 90, 296-298, 351)

5 Incomplete— Robert Holwell not only admitted that he initially lied to the police, but also admitted that he had committed perjury before the grand jury on October 18, 1974. (R. 361, 364)

5 Incomplete— In the post trial proceedings, the respondent Trolia did not simply present the police report; he presented Rebecca Lavin. She was fully cross-examined by the trial prosecutor. She was not impeached. Her uncontradicted and uncontroverted testimony was verified by three highly qualified pathologists. They testified that Paula Popik had been dead less than three days when her body was discovered. (PT 122-142, 147-149, 159-160)*

6 Incomplete— Affidavits filed by prosecutors do not appear in any Report of Proceedings. The affidavits appear in the Common Law Record simply because they were filed. There was no hearing held on said affidavits. The affiants were not subjected to cross-examination.

7 Misleading— Certainly respondent Trolia argued in the Appellate Court of Illinois that nondisclosure of Rebecca Lavin's report to the police violated due process. But, the Appellate Court chose to rest its decision on independent State grounds— violation of Ill. Sup. Ct. Rule 412(c).

* "PT" refers to Post Trial Report of Proceedings.

STATUTE INVOLVED

Illinois Supreme Court Rule 412(c) is printed in Illinois Revised Statutes 1977, Chapter 110A, paragraph 412(c). It requires that:

"[T]he State shall disclose to defense counsel any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce his punishment therefor."

STATEMENT OF THE CASE

Trolia has been in custody since February 20, 1975.

On May 11, 1976, a jury found him guilty of the murder of Paula Popik.

On February 23, 1979, the Appellate Court of Illinois reversed his conviction and ordered a new trial because the prosecution had violated Illinois Supreme Court Rule 412(c) when it did not disclose a police report of one Rebecca Lavin that she knew the deceased Paula Popik, had worked with her for seven months, and saw her alive and well two-and-one-half days after the respondent John Trolia had allegedly murdered her.

"We conclude that the cure for the State's failure to comply with [Illinois] Supreme Court Rule 412(c) and disclose such evidence must be a new trial, rather than speculation by this or any other court as to what use or effect the evidence would have been to defendant had it been timely and properly disclosed." (App. 15a, emphasis supplied.)

On May 31, 1974, the Supreme Court of Illinois denied the State's petition for leave to appeal.

The mandate has been stayed pending disposition by this Court of the State's petition for a writ of certiorari.

REASONS FOR DENYING CERTIORARI

1. THERE IS NO FEDERAL QUESTION INVOLVED.

A real, and not fictitious, federal question is essential to invoke the jurisdiction of this Court. The Appellate Court of Illinois ordered a new trial in this case because the prosecution violated Illinois Supreme Court Rule 412(c). The Supreme Court of Illinois denied the State's petition for leave to appeal. Since state courts are the final expositors of state law, the petitioner's action lacks any jurisdictional foundation.

Petitioner's jurisdictional claim ostensibly rests upon their view that the opinion of the lower court contained erroneous statements about this Court's decision in United States v. Agurs, 427 U.S. 97. The alleged misstatements do not, however, constitute the basis for the Illinois Appellate Court's judgment. Since this Court reviews judgments and not statements in opinions, any such errors are wholly immaterial.

"Our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal law, our review could amount to nothing more than an advisory opinion." Herb v. Pitcairn 324 U.S. 117, 126, 89 L. ed. 789, 794-795 (1945).

Even an erroneous decision of a federal question by a state court would not warrant this Court's review where there is:

"any other matter or issue adjudged by the State court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by a federal question." Murdock v. Memphis, 20 Wall 590, 636, 22 L. ed. 429, 444 (1875).

But, in the case at bar, the Appellate Court of Illinois did not decide any federal question properly or improperly. It simply ordered a new trial because the prosecution violated Ill. Sup. Ct. Rule 412(c).

Ill. Sup. Ct. Rule 412(c) does not require a request for disclosure of exculpatory evidence:

"(c) Except as is otherwise provided in these rules as to protective orders, the State shall disclose to defense counsel any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce his punishment therefor."

The Appellate Court cited People v. Dixon, 19 Ill. App. 3d 683, 312 N.E. 2d 390. (App. 13-14, 388 N.E. 2d, at 43) Apropos of the immediate point of discussion, the Dixon court noted that "The Illinois courts have adopted the Brady rule . . . and have expanded upon it."

That is crystal clear from the Committee Comments:

"Paragraph (c) is included to comply with the constitutional requirement that the prosecution disclose, '* * * evidence favorable to an accused. * * * where the evidence is material either to guilt or to punishment.'"
Brady v. Maryland, 373 U.S. 83 at p. 87, 83 S. Ct. 1194 at 1196-97 (1963). Although the pretrial disclosure of such material is now not constitutionally required, it is clear that, if a conviction is to be valid, the material must be disclosed so that the defense can make use of it. In providing for pretrial disclosure, this paragraph permits adequate preparation for, and minimizes interruptions of, a trial, and assures informed pleas of guilty."

Thus, it is conceivable that prosecution violation of Ill. Sup. Ct. Rule 412(c) might not violate due process rights under Brady v. Maryland. But, the Rule expands the Brady doctrine, and therefore, there is an "independent and adequate" state ground for the Appellate Court's decision to grant a new trial.

In United States v. Agurs, 427 U.S. 97, at 107, this Court said: "We are not considering the scope of discovery authorized by the Federal Rules of Criminal Procedure, or the wisdom of amending those Rules to enlarge the defendant's discovery rights." And at 109 this Court said, "Whether or not procedural rules authorizing such broad discovery might be desirable, the Constitution surely does not demand that much."

The Supreme Court of Illinois found broad discovery desirable and adopted its Discovery Rules effective October 1, 1971. They are prevailing Illinois law.

The Appellate Court correctly interpreted Illinois Supreme Court Rule 412(c) in awarding the respondent John Trolia a new trial. On May 31, 1979, the Supreme Court of Illinois denied the State's petition for leave to appeal.

Since State Courts are the final expositors of State law under our federal regime, this Court should deny the State's petition for a writ of certiorari.

2. THE DECISION OF THE APPELLATE COURT OF ILLINOIS IS CORRECT UNDER THE MOST RIGID STANDARD OF MATERIALITY.

There is no conflict between the case at bar and this Court's decision in United States v. Agurs, 427 U.S. 97. In Agurs, there was no request for exculpatory evidence, and the omitted evidence did not contradict any evidence offered by the prosecutor, and was largely cumulative of other evidence. In the case at bar, the omitted evidence contradicts and destroys for all time the prosecution's entire case.

On September 6, 1974, at about 4:00 P.M., Paula Popik's body was discovered in the shallow water of the Des Plaines River close to the bridge on Route 171 in Summit, Illinois. (R. 190) She was face down in the water. The back of her head and shoulders was exposed. The body was not floating

or it would have been carried downstream by the current. A prosecution witness testified, "It was stationary. Seemed to be stuck in the mud." (R. 196)

Five hours later, on September 6, 1974, at 9:00 P.M., Investigators Houlihan and Vanerio took a statement from one Rebecca Lavin who knew the deceased Paula Popik and had worked with her at the Godfather Lounge in Chicago Ridge for seven months. Ms. Lavin reported that she last saw Paula Popik alive and well in the Godfather Lounge on Tuesday night, September 3, 1974, after 10:00 P.M.

This police report was not disclosed to defendant Trolia at his trial.

A. THE OMITTED EVIDENCE CREATES A REASONABLE DOUBT.

The time of Paula Popik's death was the main issue at defendant Trolia's trial. The State charged in its indictment and in a bill of particulars that Paula Popik was murdered in the early morning hours of Sunday, September 1, 1974. (CL 6, 7, A. 11)

Prosecution witnesses Richard "Animal" Maskas, Tommy O'Neill, and Robert Holwell, testified that on Sunday afternoon, September 1, 1974, defendant Trolia told them that he had gotten into trouble the night before and he needed an alibi (R. 89, 296, 349-351); that at 5:00 P.M. on Tuesday, September 3, 1974, in the On-The-Rocks Lounge, defendant Trolia said to them that he had shot a girl on Saturday night, threw her body in the Des Plaines River, and burned up her car. (R. 90, 297-298, 351)

In a formal offer of proof, on November 28, 1977, Rebecca Lavin testified that she saw Paula Popik alive after 10:00 P.M. on September 3, 1974. (PT 99-111)

B. THE TRUTH OF REBECCA LAVIN'S TESTIMONY IS VERIFIED BY THE STATE'S PHYSICAL EVIDENCE.

The higher evidentiary value of information obtained from things as compared to information obtained from persons has been firmly established. Unlike testimony of witnesses, physical evidence cannot lie. It is not affected by emotions. It cannot be impeached. Courts should give greater weight to objects which speak for themselves. Objects which speak for themselves in the case at bar are (1) photographs taken by Sheriff's evidence technicians, and (2) the body of Paula Popik.

Harold Wagner, M.D., certified by the American Board of Pathology as a forensic pathologist (PT 119), was a coroner's pathologist for the County of Cook for over 11 years. He has posted between 9 and 10 thousand bodies (PT 120), including 5 to 6 hundred bodies that had been immersed in water. (PT 121) It was his opinion that Paula Popik had been dead less than 3 days. (PT 122)

The reasons underlying his opinion were:

1. Absence of extreme cloudiness of the cornea of the eyes. (PT 138)
2. Presence of rigor mortis of the lower extremities. (PT 130)
3. Absence of gas bloating of the body. (PT 134-135)
4. The skin on Paula Popik's hands was still intact. It had not glove-like disappeared. It is still intact in the photographs. (PT 138-139)
5. He would expect more degeneration of her brain had she been lying dead in the water from 5 to 8 days. (PT 139)

Paula Popik had a broken nose, discoloration of the eyes and puffiness of the face, and a split lip. In Dr. Wagner's opinion those injuries were ante-mortem — before death. One cannot bruise a dead body. (PT 129) Thus, the puffiness of her face had nothing to do with immersion in water. She was beaten in the face before being shot in the right temple.

James T. Hicks, M.D., J.D., has been certified by the American Board of Pathology in anatomical and clinical pathology. He has posted approximately two thousand bodies, about 20 of which were immersed in water. He was a consultant to the Cook County Coroner's Office from 1970 to 1973. (PT 145-146) Dr. Hicks examined the protocol and photographs of Paula Popik's body. He had an opinion that she had been dead about two days at the time her body was discovered. (PT 147)

The reasons underlying his opinion were:

1. Relative preservation of the eyes. (PT 148)
2. Rigor mortis of the lower extremities. (PT 149)
3. Little or no gas formation in the abdomen or other tissues of the body. (PT 148)
4. Whiteness and wrinkling of the hands. (PT 148)
5. Relative redness of the blood. (PT 148)

Dr. Hicks was also of the opinion that the redness of the face of the deceased was due to trauma. Paula Popik had suffered discoloration of the eye, a split lip, a broken nose, and puffiness of the face. Those injuries could have been from a beating, and had nothing to do with water immersion. One cannot bruise a dead body. The trauma to Paula Popik's face was before her death. (PT 157-159)

Charles S. Petty, M.D., certified by the American Board of Pathology in 1959 as a forensic pathologist, Past President of the Academy of Forensic Science, and Director of the Southwestern Institute of Forensic Science ("American Men and Women of Science" Vol. 5, p. 3447, 13th ed. 1976), examined the coroner's protocol and 21 photographs of Paula Popik's body. It is Dr. Petty's opinion that she had been in the water from 1 to 3 days. In addition to the reasons stated by Dr. Wagner and Dr. Hicks, Dr. Petty noted the fact that

blood was taken from the body for analysis, which he doubted would be possible after immersion in the water from 5 to 8 days. (PT 159-160)

In addition to the medical opinions of those three highly qualified pathologists, there is the impeachment of the coroner's pathologist that verifies Rebecca Lavin's testimony. When the coroner's pathologist was posting the body of Paula Popik, he stated to evidence technician Pearson that her body had been in the water approximately a day and a half. (R. 484-485)

In a new trial, it would be futile for the State to try to prove that Paula Popik was murdered in the early morning hours of September 1, 1974. The omitted evidence, which is now available, would render the general information elicited by the prosecutor from the coroner's pathologist totally irrelevant.

C. THE OMITTED EVIDENCE ENABLED THE PROSECUTORS TO DECEIVE THE JURY.

Had the exonerating evidence of Rebecca Lavin been disclosed as required by Illinois Supreme Court Rule 412(c), the prosecutors would not have been able to deceive the jury as to the time of Paula Popik's death.

The chief prosecutor laid the groundwork for the deception by very carefully eliciting from the coroner's pathologist, Dr. Claparols, general information about post mortem changes in bodies immersed in water:

- Q. Now, doctor, generally, how long does it take for a body to float, as you call it, or to appear at the top of the surface of the water?
- A. A normal condition would be five and eight days. (R. 272)
- * * *
- Q. * * * The reddening in the face and swelling of the face area and reddening or discoloration of the neck, how long after immersion in water will that appear, generally?
- A. Under normal conditions, 5 to 6 days. (R. 272-273)

From those general observations, one prosecutor told the jury that coroner's pathologist Dr. Claparols had testified that the body of Paula Popik had been in the water 5 to 8 days. (R. 600)

The chief prosecutor, in his closing argument, asserted that Paula Popik's body had been in the water 5 to 6 days, and that this was an uncontradicted scientific fact. (R. 671)

Thus, both prosecutors argued facts not based upon the record, but rather upon a deceptive reformulation of Dr. Claparol's testimony. Dr. Claparols, the coroner's pathologist, had not testified as to how long the body of Paula Popik had been in the water, how long she had been dead. He wasn't even asked for an opinion as to those matters.

The prosecution deceived the jury in other respects.

First, the face of Paula Popik was not in normal condition at the time her body was discovered. She had been beaten in the face before being shot to death. (PT 129-130, 157-158)

Second, Paula Popik's body was not floating at the time it was discovered in the Des Plaines River. Had it been floating, it would have been carried downstream by the current. A prosecution witness testified that "It was stationary. Seemed to be stuck in the mud." (R. 196)

Had the testimony of Rebecca Lavin been available to the defense at the trial, it would have been ludicrous for the prosecutors to even attempt such deception.

D. THE OMITTED EVIDENCE PROVES THAT THE STATE'S KEY WITNESSES ARE PERJURERS.

Richard "Animal" Maskas blamed the murder of Paula Popik on the defendant Trolia only after he, Maskas, had been arrested as the prime suspect, with the fully loaded murder weapon in his possession:

MASKAS: A. I believe[d] that he killed someone after I was arrested for it, you know. That is when it came to my mind.

Q. And then you decided to report it to the police?

A. Right. (R. 100)

Tommy O'Neill was impeached by prior contradictory statements. (R. 321-322) O'Neill implicated defendant Trolia after he was told that he would be charged with the murder himself. (R. 324) He had known Maskas for 16 years, Trolia for 4 years. (R. 330)

When Robert Holwell was arrested, he denied any knowledge of the death of Paula Popik. (R. 373) At trial, he testified that he committed perjury before the grand jury on October 18, 1974. (R. 361, 364)

To have those witnesses repeat the patent lie that defendant Trolia confessed to killing Paula Popik on Sunday morning, September 1, 1974, would be absolutely fatal to the State's case. That is why the State has not answered ready for trial.

Paula Popik was murdered sometime after 10:00 P.M. on Tuesday, September 3, 1974. See the uncontradicted testimony of Rebecca Lavin (PT 99-111), and the verification of her testimony by Dr. Harold Wagner (PT 122-139), Dr. James T. Hicks (PT 147-149), and the stipulated testimony of Dr. Charles S. Petty. (PT 159-160)

E. THE OMITTED EVIDENCE PUTS THE MURDER WEAPON IN THE HANDS OF PROSECUTION WITNESS MASKAS AT THE TIME OF PAULA POPIK'S DEATH.

Prosecution witness Richard "Animal" Maskas testified that on August 30, 1974, at about 5:00 P.M., he loaned a 4-shot .22 caliber Derringer pistol to the defendant Trolia. (R. 84-86, 88)

Defendant Trolia testified that he did not borrow the .22 caliber Derringer from Maskas. (R. 505)

On cross-examination, Maskas testified:

Q. Now, when was it that you got the weapon back?

A. I got it back a couple of days later. (R. 89)

Q. Now, when you got that gun back, Mr. Maskas, did you keep it?

A. Yes. (R. 91)

Q. Now, when did you say that you first heard from Mr. Trolia that he killed somebody with this gun?

A. A few days after he gave me the gun back. (R. 98)

The defendant Trolia's admission was supposed to have been made in the On-The-Rocks Lounge on Tuesday, September 3, 1974, at about 5:00 P.M. (R. 90, 297-298), 351) Therefore, "Animal" Maskas testified that he had exclusive possession of the alleged murder weapon at all times from September 1, 1974, until September 8, 1974, at which time Maskas was arrested with the weapon fully loaded. (R. 100)

That conclusion is inescapable if one counts forward from August 30, 1974 ("a couple of days later"), and backward from the alleged admissions on September 3, 1974 ("a few days after he gave me the gun back.").

At a new trial, if there ever is one, if "Animal" Maskas does not put the smoking gun in his own hand at the time of Paula Popik's death—sometime after 10:00 P.M. on Tuesday, September 3, 1974—then we will. We have a copy of the trial transcript.

It is far more likely that Maskas murdered Paula Popik. Long before Trolia was implicated, Robert Holwell told his brother, Sgt. Holwell of the Bridgeview Police Department, that the murder of Paula Popik was drug related, naming "Rabbi" and Makasis (phonetic) as the killers. (Supplemental Report of Investigator Leubscher 9-12-74)

Richard "Animal" Maskas, Tommy O'Neill, and Robert Holwell were involved in the illicit drug sub-culture. (R. 165-166, 310, 316, 371, 375)

F. THE UNDISCLOSED EVIDENCE OF REBECCA LAVIN LENDS CREDENCE TO THE DEATH OF PAULA POPIK BEING DRUG RELATED.

James Dvornik, a former Oak Lawn police officer (PT 46), testified in a post trial hearing on October 17, 1977. Dvornik knew Paula Popik and her brother Jimmy Popik for 6 years. (PT 20-21) Paula Popik was selling drugs for her brother Jimmy Popik. Sam Annerino, a reputed crime syndicate chieftain (PT 49), now deceased, was supplying Jimmy Popik with the drugs. (PT 61)

In September, 1975, Sam Annerino asked Dvornik to find out who had killed Paula Popik. Dvornik spoke to Jimmy Popik in the Fox Pump tavern in Oak Lawn, and Jimmy Popik suggested that Dvornik go to the On-The-Rocks Lounge to gain information. (PT 24)

In November, 1975, Dvornik spoke to Jimmy Popik in the Fox Pump tavern. (PT 33) Popik told Dvornik that Sam Annerino had paid Lt. James Keating to pull and lose the police report (PT 34) because he wanted to make sure that John Trolia was convicted of murdering Paula Popik. (PT 37) Jimmy Popik then offered Dvornik twenty-five hundred dollars to "hit" John Trolia, to kill him. (PT 46) Dvornik told Jimmy Popik that he would get more information concerning the killing of Paula Popik. (PT 47)

In December, 1975, Dvornik was seated at the bar in the On-The-Rocks Lounge. (PT 24) He heard Tommy O'Neill and Animal Maskas talking about a cocaine deal. They did not want to get ripped off. Tommy O'Neill said, in the presence of Maskas, that "Animal"(Maskas) could take care of any situation that arose (PT 26, 54); that "Animal" had killed a girl (PT 26); that he had "hit" a syndicate bitch named Paula (PT 27-28, 55); that they should not

have killed her because she was related to someone that was a "heavy." (PT 28)

Dvornik told Jimmy Popik that it was "Animal" Maskas who had killed his sister Paula, but Jimmy Popik still wanted Trolia "hit." (PT 56)

Dvornik wrote letters to the State's Attorney's Office that he had information about the killing of Paula Popik (PT 50-53), but he did not come forward with specific information because he was afraid for the safety of his family. (PT 57) Sam Annerino had told him to mind his own business. (PT 59) Dvornik felt safe in coming forward after Annerino's death. (PT 65) Sam Annerino was shot to death in typical gangland fashion in front of a furniture store in Oak Lawn. (PT 35)

RECAPITULATION

Trolia testified that he had never met Paula Popik. He denied killing her. He denied ever telling Maskas, O'Neill, and Robert Holwell that he had shot her. (R. 505)

Had the testimony of Rebecca Lavin been available to the defense at trial, the jury may well have been unwilling to act upon the perjury of Maskas, O'Neill, and Robert Holwell.

Now, however, the testimony of Rebecca Lavin is available, and so is the testimony of every truly qualified pathologist in the world to verify and corroborate her. The State cannot prove a case against the defendant Trolia.

That is why the State refuses to answer ready for trial. That is why the State is pursuing a highly discretionary writ of certiorari.

Under the circumstances of the instant case, the State's delay is reminiscent of the delays that prompted the framers of our Constitution to give the right to a speedy trial first place in the Sixth Amendment.

CONCLUSION

For the foregoing reasons we ask Your Honors to deny the petition for a writ of certiorari.

Respectfully submitted,

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